The Madras Law Journal

MARCH OF LAW 1984.

Introduction:—"Search through the cases and see whether the instant problem has come up before. If so, go by it, if not go by the nearest you can find" [Per Lord Denning in *Heather* v. *E.E. Consulting Group Ltd.*,[1]] At the same time one has to note the warning of Lord Wilberforce "While guidelines are provided by decided cases, it should not be thought that particular phrases employed in any of them taken singly will unerringly lead one to the right couclusion". It is an obligation of every superior Court to lay down the law in a positive way so that confusion does not get into the arena of judicial thought. One of the qualities of law being that it must be clear and definite, it is equally the duty of the superior Courts to see that the decisions stick to these principles [*Tejuram Jain* v. *Diwan Chand Chawla*[2],] The Court's real merit will manifest itself only if the Court cleans the cobwebs of the law and gives a push forward to modern trends in jurisprudence. A step onward, a difficulty solved, a doubt cleared, a conflict settled, a new vista oponed would be really a march of law. *Via trita, via truta* (beaten path is safe path) is in sooth caution against over-activisim. Excess of caution may hold a principle in fetters and stunt its development. New problems and situations continuously arise when analogies may prove equivocal and precedents are silent. The path of judicial interpretation is then to hold a just middle way between excess of valour and excess of caution. It is sometimes said that precedents ensure certainty in law. Apropos this, one is reminded of the statement of a famous Judge: "Certainty I regard, often as a will o-the-wisp" It is hardly disputed that precedents should not "like the coral reef become a structure of fossils." It is interesting to know that the European Court at Luxembourg favours schematic and teleological method of interpretation looking to the scheme or design and filling up gaps. In the light of the aforesaid norms the question of the march of law during the expiring year, whether real or illusory, falls to be gauged The following review briefly sets out the law as found in the decisions of our High Court in the course of 1984 and a few decisions of the Supreme Court under some of the more important titles of law.

1. 48 T.C. 293.
2. (1983) 55 Cut. L.T. 224.

High Court: *Jurisdiction and Powers*—In *Sundaram Finance* v. *State of Tamil Nadu*[1], it is held that the High Court cannot direct the lower Court to keep a plaint un-numbered indefinitely. The lower Court cannot be directed to receive a plaint without payment of the full Court fee. The High Court cannot sit in appeal over the interim orders passed by the Supreme Court in an appeal pending before it. *Rajeswari* v. *Palaniappan*[2], states that though the right to relief in an action between parties must be be judged in relation to the date of the suit, the Court may take subsequent events into consideration for moulding the relief in fairness to both the parties. *Chief Engineer* v. *Raman*[3], points out that the High Court exercising powers under Art. 226 of the Constitution is not exercising administrative jurisdiction over the affairs of the Electricity Board. In C.M.A. No. 76357 of 1980[4], it is laid down that the High Court is not constituted as a Special Tribunal to hear appeals under the Motor Vehicles Act. Sec. 110-D merely states that any person aggrieved by an award of the Claims Tribunal may within the time prescribed prefer an appeal to the High Court. When the statute directs an appeal to an ordinary civil Court without in any manner prescribing the practice, procedure and powers of such Court as a civil appellate Court, the Court will have to deal with the appeal with all the trappings and powers of an ordinary civil Court of appeal. In *Siligiri Municipality* v. *Amalendu Das*[5], the Supreme

1. (1984) 1 M.L.J. 1.
2. (1984) 2 M.L.J. 62.
3. (1984) 2 M.L.J. 137.
4. Judgment dt. 7th July 1984.
5. A.I.R. 1984 S.C. 653.

Court holds that normally the High Court should not as a rule in proceedings under Art. 226 of the Constitution grant any stay of recovery of any tax. The grant of stay in such matters should be an exception and not a rule. The Court should strike a delicate balance after considering the pros and cons of the matter lest the larger public interest is not jeopardised and institutional embarrassment is eschewed. In *Mittal* v *State of Haryana*[1] the Supreme Court points out "it is desirable that the High Court when dismissing a writ petition *in limine* should set forth a brief statement of the reasons for its order instead of disposing of the proceeding by the single word 'dismissed'".

Bar: Its privileges and duties.—In *Pandurang* v. *Bar Council*[2] the Supreme Court elucidates: (1) An advocate stands in *loco parentis* towards litigants. Where he is entrusted with a brief he is expected to follow norms of professional ethics and try to protect the interests of his client in relation to which he occupies a position of trust. He is expected to give proper and dispassionate legal advice to his client for the protection of his interest. (2) Giving improper legal advice by an advocate is different from giving wrong legal advice. Negligence unaccompanied by moral delinquency in the exercise of his profession does not amount to professional misconduct, but to act towards his client otherwise than with the utmost good faith is unprofessional. (3) There is nothing unprofessional in drafting an affidavit on the instructions of the client, but it is professionally improper for a member of the Bar to prepare false documents or to draw pleadings knowing that the allegations made are untrue to his knowledge. (4) Findings in disciplinary proceedings by the Bar Council must be sustained by a higher degree of proof than that required in civil suits, yet falling short of the proof to establish a conviction in a criminal prosecution. There should be a convincing preponderance of evidence.

Constitutional Law.—In *Vadiappan* v. *State of Tamil Nadu*[3] it is held that inasmuch as the taking over of the manufacturing activity of arrack by the State involved considerable finance and the availability of the technical know-how and other infrastructural facilities and the Government felt that it did not have the financial and other such facilities at present enabling it to take over the manufacture of arrack from the private sector to the public immediately, the contention that the Government's action in choosing to take over only wholesale supply leaving out manufacture is arbitrary is not acceptable. The exclusion of the manufacturers from the operation of the T.N. Prohibition (Second Amendment) Ordinance IV of 1938 is not discriminatory and the impugned Ordinance is constitutionally valid. Since the requirements of Article 213 of the Constitution, namely that the State Legislatures should not be in session when the Ordinance was issued and the Governor was satisfied as to the existence of circumstances which rendered it necessary for him to take immediate action, were satisfied in the instant case, the Ordinance could not be challenged on the ground that there was no urgency or that there was no satisfaction by the Governor as to the circumstances warranting him to take immediate action. The plea of promissory estoppel is not available to a party against a legislative or sovereign function. There is no fundamental right to do trade or business in intoxicants and the State, under its regulatory powers had the right to prohibit absolutely every form of activity in relation to intoxicants, its manufacture, storage, export, import, sale and possession, and in all their manifestations these rights are vested in the State. In *State of Tamil Nadu* v. *Abu Kaur Bai*[1]; the Supreme Court in holding that the T.N. State Carriage and Contract Carriages (Acquisition) Act—XII of 1973—is constitutionally valid, makes it clear that although the Directive Principles are not enforceable, yet the Court should make a real attempt at harmonising and reconciling the directive prineiples with the fundamental rights and any collision between the two should be avoided as far as possible. Article 31-C gives a complete protective umbrella to any law passed with the object of achieving the aims and goals of Article 39 (*b*) and (*c*) so as to make it immune from challenge on the ground that it violates Articles 14, 19 or 41. The only condition for the application of Article 31-C is that

1. A.I.R. 1984 S.C. 1888, 1890.
2. A.I.R. 1984 S.C. 110.
3. (1984) 1 M.L.J. 96.

1. A.I.R. 1984 S.C. 326.

there should be a nexus between the concerned law and the provisions of Article 39 (*b*) and (*c*) and the reasonableness should be regarding the nexus rather than the law. Even a nationalisation scheme meant for the purpose of distribution or preventing concentration of wealth would be sufficient nexus to attract the operation of Article 39 (*b*) and (*c*). A declaration in the impugned Act regarding the purpose mentioned in Article 39 (*b*) and (*c*) may generally be evidence of the nexus between the law and the objects of Article 39 (*b*) and (*c*). The Preamble to the Tamil Nadu State Carriage and Contract Carriage (Acquisition) Act (XII of 1973) expressly mentions that the Act was passed with the intention of giving effect to Art. 39 (*b*) and (*c*) and is thus protected under Article 31-C. The contention that by virtue of the Act the financiers who were the owners of the stage or contract carriages would be completely wiped out of businees and thereby Article 19 is violated cannot be accepted. The State has nationalised the stage and contract carriages for the purpose of providing a general and expeditious transport at reasonable rates to the members of the public and such policy is in public interest and constitutes an important public purpose. The term "distribution" in Article 39 (*b*) does not mean only distribution of a particular kind or to particular persons but comprehends apportionment, allotment. allocation and classification. By nationalising transport as also the units, the vehicles would be able to go to the farthest corners of the State and penetrate as deep as posssible and provide better, quicker and more efficacious facilities This would undoubtedly be a distribution for the common good of the people and would be clearly covered by Article 19 (*c*). Nationalisation of transport is a distributive process for the good of the community. By nationalising the transport business which was otherwise run by a handful of capitalists the concentration of wealth in the hands of a few would be avoided and would therefore benefit the community at large. The expression "material resources" in Article 39 (*b*) is wide enough to cover not only natural or physical resources but also movable or inmovable properties such as vehicles, tools and implements, workshops etc. The mere fact that the resources are material will make no difference in the concept of the word "resources". In *Gramaphone Company of India Ltd.* v. *Birendra*[1], the Supreme Court adverting to correlation between International Law and Municipal Law, holds that nations must march with international community and municipal law, must respect rules of international law even as nations respect international opinion. The comity of nations requires that rules of international law may be accommodated in the municipal law even without express legislative sanction provided they do not conflict with Acts of Parliament. But when they run into such conflict, the sovereignty and the integrity of the republic and the supremacy of the constituted legislatures in making the laws may not be subjected to external rules except to the extent legitimately accepted by the constituted legislatures themselves. The doctrine of incorporation also recognises the position that the rules of international law are incorporated into national law and considered to be part of the national law unless they are in conflict with an Act of Parliament. Comity of nations or no, municipal laws must prevail in case of conflict. *Ramamooorthy Sastry* v. *Silver Paints and Varnish*[2], states that all legislations are territorial in operation and Article 215 adumbrates this principle. All the Acts of the Tamil Nadu State Legislature can have only territorial operation. It cannot and will not apply to persons outside the State or affect events that take place outside. Extra-territorial application will arise only when there is a nexus between, the legislation and the person or thing placed outside the territories. Hence it does not follow that a debt which had ripened into a decree in a Court outside the State of Tamil Nadu will get discharged or execution abated in respect of the said decree transferred for execution in a Court in Tamil Nadu. *Chief Engineer* v. *Ratnam*[3] decides that the High Court exercising powers under Article 226 is not exercising administrative supervision over the affairs of a body like the Electricity Board. *Surya Rao* v. *Madras Refineries Ltd*[4], expresses the view that the High Court is not a Court of Appeal against orders of promotion, nor is the Court an administrative tribunal to consider the propriety or otherwise of the orders of promotion, in the absence

1. A.I.R. 1984 S.C. 667.
2. (1984) 2 M.L.J. 1.
3. (1984) 2 M.L.J. 137.
4. (1984) 2 M.L.J. 318.

of patent and glaring *mala fides* made out against the employer. A Government Company can be regarded as an "authority" for the purpose of Article 12 if it has the attributes of an instrumentality or agency of the Government. *Viswanathan* v. *Dy. Registrar of Co-operative Societies*[1], holds that where effective alternative remedies exist under the concerned statute the petitioner cannot invoke the extraordinary jurisdiction of the High Court under Article 226. *Giridharilal* v. *State of Tamil Nadu*[2], decides that the right to carry on trade as an auctioneer is a fundamental right and hence where the impugned rule is not a regulatory measure (Rule 12, clause 5) in the Tamil Nadu Pawn Brokers Rules, 1944 (as amended by G.O Ms. No. 1259, Revenue, dated 29th May, 1981, in the instant case), but imposes unreasonable restrictions, it is not protected by Article 19 (6) and *certiorari* will issue. *Rajeswari* v. *United India Insurance Co.*[3], points out that the power of superintendence is both judicial and administrative. To proceed on the basis that for exercising powers under Article 227 one should look to the legislation because exercise of pcwer under the Article in a particular manner would go against the substantial provisions of the enactment overlooks the fact that the power under Article 227 is a constitutional power and no legislative enactment can take away or circumscribe or nullify the exercise of the supervisory powers conferred by the Constitution on the High Courts. The power of transfer of proceedings within its jurisdiction is part of the supervisory jurisdiction and the absence of a provision in the Motor Vehicles Act for transfer to be effected would not deprive the High Court of the power to transfer pending proceedings from one Tribunal to another, if circumstances warrant. *George Verghese* v. *Food Corporation*[4], holds that it is not open to the Department to resurrect the same old charges on which the petitioner faced a criminal trial and was acquitted to proceed departmentally. Where the charges in the trial Court and the memorandum of charges served later on the petitioner were identical, there is no jurisdiction for the Department to proceed against him.

1. (1984) 1 M.L.J. 92, cf., *Indrani Ammal* v. *Unnikrishnan*, (1984) 2 M.L.J. 310.
2. (1984) 2 M.L.J. 333.
3. (1984) 1 M.L.J. 19.
4. (1984) 1 M.L.J, 49.

Industrial and Labour Law.—In *Swadeshi Cottan Mills T.S.P. Union* v. *National Textiles Corporation*[1], it is held that an industry must be owned by the person or entity before there could be carrying on either by the owner or under the authority of the owner. In respect of an industry carried on by or under the authority of the Central Government it will be equated to an employer under the Indnstrial Disputes Act, though for the purpose of representation it will be "the authority prescribed in this behalf or where no authority is prescribed the head of the Department," It is the ownership of the industry by the Central Government and not its management, however pervasive and deep it may be, that is the decisive test of its being a Central Government undertaking. In the case of companies and corporations the control by the Central Government wholly or partly will not lead to the conclusion that the company or corporation is owned by the Government. *Workers of Mica Farm Chemicals* v. *Government of Tamil Nadu*[2], observes that section 11-A of the Industrial Disputes Act confers a very valuable right on the workmen since even if after reference when the matter goes before the Tribunal or Labour Conrt it is found that the charges are proved he can yet question the punishment. Though the misconduct alleged against the workman stands proved and Government feel that the punishment is grossly disproportionate to the misconduct alleged nevertheless the Government will be duty bound to make a reference. Declining is possible only if there is a consideration of the same. It is not necessary that the order declining to make a reference itself must contain the statement so long as one is able to discern the same from files. *Coimbatore Periyar Mavatta DPTM Sangam* v. *State of Tamil Nadu*[3], lays down that where the Government is of the opinion that there is a *bona fide* dispute requiring adjudication the Government has ample power to make a reference of the dispute under S. 10 (B) for adjudication by the Industrial Tribunal. G.O. Ms. No. 2383, Labour and Employment Department dated 9-11-1982 is in perfect accord with S. 10 (B) and the Government

1. (1984) 1 M.L.J. 228.
2. (1984) 1 M.L.J. 371; See also *Loganathan Special Officer*, (1984) 2 M.L.J. 245.
3. (1984) 2 M.L.J. 102.

is entitled to say that because, the cotton industry is declared as a public utility service for the purpose of the Industrial Disputes Act and because it is of opinion that for the purpose of maintaining supplies and services essential for the life of the community, for maintaining employment and industrial peace in the cotton textile industry, there shall be no strike. *Kalpana Textiles* v. *Additional Commissioner for Workmen's Compensation* [1] holds that under the later clause in S. 25- (2) the rights and liabilities of employers and workmen in so far as they relate to lay-off and retrenchment shall be determined in accorhance with Chap. V of the Industrial Disputes Act, and hence any State Act will have to give way to that extent. *Gopalakrishnan* v. *Management of Indian Potash Ltd.* [2], takes the view that for the purpose of S. 33 (2) (*a*) it has to be seen whether the employer has altered the terms and conditions of service *de hors* the terms of the employment which will amount to contravention of that provision. Where according to the terms and conditions of appointment the appellant was liable to serve in any of the offices or field locations of the management within the Indian Union as may be decided by the management from time to time *primafacie* the transferability of the appellant to any place in India is a condition of service applicable to him.

Contracts and ancillary laws.—In *Mrs. M.M. Roy* v. *Pandian*,[3] it is elucidated that the maxim *in pari delicto potior est conditio possidentis* is an application to particular set of circumstances of a more general maxim *ex turpi causa non oritur actio* signifying that no right of action arises out of a wicked cause, that the phrase *in pari delicto* suggests that there should be an act of delinquency, an illegal act and both parties should be delinquents, that too, equally, with the same degree of guilt, and that where money was paid to the defendant as a loan believing he would help in securing a seat in the Medical College for the plaintiff's son but the seat was not secured the transaction is not illegal. The plaintiff does not endeavour to recover money paid as a *quid pro quo* for a seat to be secured by the defendant exerting influence on the Committee of selection, that the real cause of action is loan of the money which the defendant had undertaken to repay and the plaintiff does not have to rely on the matter of admission for the recovery of the loan. *Mrs. Mehra Belgamvala* v *Bell and Co*[1] states that "goodwill" is a composite thing referable in part to the locality of the firm, in part to the way in which the business is conducted and personality of those who conduct it, and in part to the likelihood of competition etc. The method of valuing goodwill in practice is "certain number of years purchase of past profits or earnings. It is calculated on the following bases; (1) the profits for an agreed number of years preceding the evalution when averaged, so as to arrive at the annual profits earned during the period and (2) the goodwill is then estimated to be at so many years' purchase of such average profits.

Sesharal Bajna v. *Subramanian* [2] expresses the view that in a blank promissory note without a date on the note and the name of the promisee, unless the drawee's name is inserted before the filing of the suit, the instrument is not a promissory note. Unless the plaintiff or the holder exercises the authority under section 20 of the Negotiable Instruments Act within a reasonable time it does not import a contract and he cannot recover the amount on the instrument. The date of the promissory note if subsequently filled though with the permission of the Court, will amount to material alteration. As in the instant case the plaintiff had filed the suit without even filling up the date under the authority afforded under section 20, the position is the alteration affects the very contract itself and no decree can be passed on such an instrument which had no legal existence on the date of the suit.

Property Law.—In *Venkatesa Chettiar* v. *Annamalai Industrial Corporation*[3] it is held that conversion of paddy into rice is not a manufacturing process as per section 106 of the Transfer of Property Act. The lease of a rice mill consisting of the premises and the rice milling machinery belonging to the landlord and erected in the building is a composite lease exempt from the provisions of the T.N Buildings (Lease and Rent Control) Act of 1960. *Rajeswari* v. *Palani-*

1. (1984) 1 M.L.J. 74.
2. (1984) 1 M.L.J. 218.
3. (1984) 2 M.L.J. 303.

1. (1984) 1 M.L.J. 139.
2. (1984) 1 M.L.J. 144.
3. (1984) 2 M.L.J. 92.

appan[1] holds that where a tenant acquires, the interest of the landlord in the eviction suit there is no *lis* as the main interest coalesces in a single person and the suit has to be dismissed as having become infructuous even under the Rent Control Act without reference to section 111 of the Transfer of Property Act.

Land Tenures and Tenancy Legislation:— In *Palanisankar* v. *Commissioner of Land Administration*[2] it is pointed out that non-ryoti land in an estate taken over under the T.N. Estates (Abolition and Conversion into Ryotwari) Act 26 of 1948 in respect of which the plaintiff's predecessor-in-title had been let into possession by the landlord will have to be dealt with under section 19 (A) of the Act. If during the settlement inquiry the land had been registered as pannai poromboke action should have been taken under section 19 (A) either by the petitioner for grant of patta subject to such terms as may be specified or by the Department for eviction of the petitioner or his predecessor-in-title as a person not entitled to be allowed to remain in possession. No such action had been taken in the instant case; no period of limitation has been however perscribed for filing an application under section 19 (A). The Director should consider the application now filed under section 19 (A) and dispose of the same on merits after issuing notice to the pesitioner calling upon him to produce the relevant records and evidence establishing his claim for grant of patta under section 19 (A). *Ranganathaswamy Devasthanam* v. *Mavadian*[3] holds that where the Inam Fair Register and other relevant documents showed that the grant in question was in favour of the temple section 44 of the Tamil Nadu Estates (Abolition of Minor Inams and Conversion into Ryotwari) Act 30 of 1963 makes it clear that such a grant has to be presumed as iruvaram grant. As the grant was in favour of the temple, and is an iruvaram grant there is no difficulty in directing the issue of patta in favour of the temple under section 8 (2) (*ii*) of the Act. All the rights including that of adverse possession will vest with the Government under S. 3 and the legislative intent was not to recognise for the purpose of the Act any claim to ryotwari patta on the basis merely of adverse possession.

1. (1984) 2 M.L.J. 62.
2. (1984) 1 M.L.J. 308.
3. (1984) 1 M.L.J. 43.

The imparting of instruction in the Vedas and Agamas is a religious purpose and when a public trust provides for imparting of such instruction, *Kamala Ganapathi Subramanian* v. *Authorised Officer*[1] decides that the lands set apart for the purpose can claim exemption under section 2 (1) (*ii*) of the Tamil Nadu Land Reforms (Fixation of Ceiling on Land) Act 58 of 1961 from the provisions of the Act.

Pankajam v. *Chinnasamy Naidu*[2] makes it clear that where the very letting of the suit properties to the respondent for cultivation had been disputed and though it may be that the authorities have to decide the question as a jurisdictional fact before considering the other matters which could be relevant under section 3 (2) of the Tamil Nadu Agricultural Land (Record of Tenancy Rights) Act 10 of 1960, yet those are all matters over which the Record Officer or other authority functioning under the Act alone will have jurisdiction and the civil Court cannot go into the questions. If the civil Court cannot proceed to investigate whether the person is a cultivating tenant or not, then, equally it cannot declare that he has such rights. The consequential relief of injunction depends upon the adjudication as to the status of the plaintiff and when that cannot be done by the civil Court, the consequential relief also cannot be granted. *Vanamamalai Muthiriar* v. *Srinivasa Muthiriar*[3] holds that where a suit for a permanent injunction to restrain the defendant from interfering with his possession was filed on 1st November, 1971 earlier to the introduction of section 16-A of the Act in the year 1972, the jurisdiction of the civil Court to entertain the suit for injunction cannot be said to have been taken away by S. 16-A of the Act.

Manickam v. *Dharmapuram Adheenam*[4] lays down that the definition of kudiyiruppu in Tamil Nadu Kudiyiruppu Act makes it

1. (1984) 1 M.L.J. 78; See also *Rajammal* v. *Authorised Officer*, (1984) 1 M.L.J. 270 (case of vedaparayanam).
2. (1984) 1 M.L.J. 345.
3. (1984) 2 M.L.J. 269.
4. (1984) 2 M.L.J. 189.

clear that what is contemplated by kudiyiruppu is the site of any dwelling house. The emphasis is on the site and it will not take within it a building. The superstructure came to be included only under the 1971 Act. Only on such of those agriculturists who were in enjoyment of kudiyiruppu the Act conferred benefit. Where the building alone was demised there is absolutely no scope for applying the Tamil Nadu Act 17 of 1978. To invoke the benefits of the latter Act, one must be a cultivating tenant with reference to the demise. He cannot be a cultivating tenant with reference to a building.

Ganapathy Thevar v. *Executive Officer*[1], holds that where the Revenue Court granted time for payment of arrears of rent till a particular date and the arrears not being paid on that date an eviction order was passed on the same day against the tenant, the order is one passed without jurisdiction. *Rasu* v. *Special Deputy Collector*[2], points out that where the parties asked the Revenue Court to give a decision on the basis of a joint endorsement in the teeth of section 3 (4) (*b*) of the Tamil Nadu Cultivating Tenants Protection Act it was a serious departure from the ordinary procedure and practice of the Revenue Court putting the Court wholly and totally out of its course. By the joint endorsement the petitioner-tenant had agreed that no discretion in the matter of granting time need be exercised in his favour and no further time also need be granted, a course directly opposed to section 3 (4) (*b*) and requested the Court to adopt a procedure *extra cursus curials*. *Singara velu Pillai* v. *Subramania Gurukkal*[3], states that where in a petition for eviction a preliminary order directing deposit of rent on or before a particular date was made and the rent not being so paid or deposited on the day following an eviction order was passed, the order is valid and legal.

Sivanu Mudaliar v. *Sivapakia Nadar*[4]. decides that the scope of enquiry under section 5. (2) of the Tamil Nadu Cultivating Tenants (Payment of Fair Rent) Act—24 of 1956—is restricted and compact and permits consideration of remission in the rent on the ground of adverse seasonal conditions which result in the reduction of the gross produce from any particular crop to the extent of more than 25 per cent and the scope of the consideration of the claim for discharge of the arrears of rent under Tamil Nadu Act 15 of 1980 is completely different from the scope of the consideration of an application under S. 5 (2) of the former Act—24 of 1956.

1. (1984) 2 M.L.J. 219.
2. (1984) 2 M.L.J. 1.
3. (1984) 1 M.L.J. 298.
4. (1984) 2 M.L.J. 243.

Thamirassu v. *Kamalathammal*[1], takes the view that under the Pondicherry Cultivating Tenants Protection Act—9 of 1971—there cannot be a direction by the Presiding Officer in the same order that the failure to deposit the paddy or its value within two months will result in the tenant being evicted from the concerned lands and such order is liable to be set aside. *Sivachidambaram* v. *Annamalai Mudaliar*[2] points out that to decide whether a kuthakaikarar of cocoanut trees for collecting the usufruct would be entitled to the benefit of the Pondicherry Cultivating Tenants' Protection Act it is not sufficient merely to give a finding as to whether the demise was of the usufructs alone or of the land also. There ought to be a probe into the further question as to whether the plaintiff fulfils the character of a cultivating tenant under the Act. For this the Court will also find out as to whether the land was transferred for cultivation, namely the use of the land for purposes of agriculture or horticulture and as to whether the plaintiff contributed his own physical labour or that of any member of the family in the cultivation of the land.

Hindu Law and related legislation.—In *Krinan* v. *Ramaswami*[3] it is held that a coparcener who challenges the title of the member of the joint family who has purchased property in his own name and pleads that it should also be brought into the hotch-pot, has to establish by cogent and mature evidence that there was enough surplus income available in the joint family which positively could be the foundation for the acquisition but the application of the principle to a particular case will have also to be done with reference to the facts of each case. Where the entire bequest cannot stand since the concerned

1. (1984) 1 M.L.J. 11.
2. (1984) 1 M.L.J. 419.
3. (1984) 2 M.L.J. 133.

property was joint family property, the bequest in so far as it related to the share of the testator can be sustained in favour of the legatee. *Sarojini Ammal* v. *Anbazhgan*[1], states that it is not for the female member to prove how she acquired the property; it is for the challenger to establish that the property standing in the name of the female members is not their own and unless there is definite clinching proof to the contrary adduced by the challenging member and unless it is established that the surplus income from the joint family property constituted the source for the purchase of the property in the name of the female member it cannot be claimed to be joint family property. *Vijayalakshmi* v. *Ganesa Iyer*[2], makes it clear that the karta of an erstwhile joint family could not act for and on behalf of the heirs or a deceased coparcener (under section 6, Hindu Succession Act) for the purpose of effectuating alienation of the severed interest of the deceased coparcener in the joint family properties, nor could it be stated that any acquisition made after the relevant date should be deemed to have been made for the benefit of the heirs of the deceased coparcener merely because physical division had not taken place. The normal presumptions with regard to acquisitions by the karta could not be invoked. *Sampoornammal* v. *Asokan*[3] lays dowu *inter alia* that where the existence of a family necessity is established, the manner in which it should be met and the manner of application of the money for the purpose of meeting the necessity is a matter entirely for the manager to decide and so long as he does it honestly in the interests of the family the fact that another person in his position could have or would have made a better arrangement for meeting the necessity is not an argument available to invalidate the actual arrangement made by the manager.

Kuppuswamy v. *Deivathal*[4] expresses the view that the provisions of the Hindu Marriage Act as such do not lay down in specific terms that the violation of S. 5 Cl. (*iii*) would make the marriage void or voidable. It is not therefore possible to charactarise such marriage as invalid so as to disentitle the wife from claiming maintenance. *Deivannai Ammal* v. *Subbiah Pillai*[1] points out that there is a difference between the Common Law and the Hindu Marriage Act approaches regarding maintenance for the wife. The wife has a cause of action in Common Law for maintenance if there is desertion on the part of her husband or cruelty which entitled her to live separately. If the wife fails to establish that she has got the right she is not entitled to maintenance under Common Law. The Court exercising jurisdiction under the provisions of the Hindu Marriage Act is empowered to allow permanent alimony to a divorced wife.

Suresh Babu v. *Mahu*[2], elucidates that guardianship, in its ordinary connotation, would take in custody and care of the minor which could be equated to guardianship of the person; and custody and control of the property is really guardianship with reference to the property of the minor. The proviso to section 6 of the Hindu Minority and Guardianship Act however carves out a special right relating to custody in favour of the mother where the infant child has not completed the age of five years. Though the father would still be the natural guardian of the infant under section 6 he would not as of right be entitled to the custody of the infant. It is not necessary in every case where the statutory recognition of the preferential claim of the mother to the custody of an infant child who has not completed five years is sought to be enforced that the father should be found to be disqualified or that there should be a prayer for the removal of the father as the natural guardian and for the appointment of some other person as a suitable guardian. In such cases it is not merely the rights of parties with reference to custody that have to be concidered. Any such adjudication must be for the welfare of the infant child and the expression "welfare" must be understood as meaning and including every circumstance which must be taken into consideration.

Vijayvlakshmi v. *Ganesa Iyer*[3], lays down that the proviso and *Explanation* to S. 6 of the Hindu Succession Act leaves no room

1. (1984) 2 M.L.J. 313.
2. (1984) 2 M.L.J. 299.
3. (1984) 1 M.L.J. 66.
4. (1964) 1 M.L.J. 90.

1. (1984) 1 M.L.J. 267.
2. (1984) 1 M.L.J. 381.
3. (1984) 2 M.L.J. 299.

for doubt that on the death of a coparcener there would be a destruction of the joint family as it existed prior to his death and there could no longer be a joint family taking in the interest of the deccased coparcener which got severed on the footing of a notional partition and which interest gets devolved on the heirs of the deceased coparcener by intestate succession in the absence of a testament. There could be determination of the share of the deceased coparcener only in the assets of the joint family as they existed on the date of the demise. Not only the ratio of the sharing, but also the assets, out of which the share has got to be carved out get determined as on the date of the demise of the coparcener. *Kuppu* v. *Kuppuswami Manotditi*[1] declares that where on the date of the opening of succession the appellant-widow did not suceed to her husband due to her unchastity on that date, under Act 18 of 1937, she could not become full owner as she did not have any estate, under S. 14 of the Hindu Succession Act. S. 28 of the latter Act can operate only in cases where the inheritance opens after the coming into force of the Act.

Law of Limitation.—In *Sendamarai Ammal* v. *Vijaya Rajagopal Chettiar*[2], it is pointed out that the cumulative effect of section 3 and section 29 (2) of the Limitation Act is that where any special or local law prescribed for a proceeding a period of limitation different from the provision made in that regard in the Schedule, then section 3 shall be applicable as if such period were the period prescribed by the Schedule and for ascertaining the period of limitation prescribed for any proceeding by any special or local law sections 4 to 24 shall be applied to the extent to which there is no express exclusion of their applicability by the special or local law. *Handalappa etc, Co.* v. *Krishna Reddy and Co.*[3], holds that in view of the express exclusion in-built in the proviso to section 25 (2) of the Tamil Nadu Buildings (Lease and Rent) Control Act, section 5 of the Limitation Act would not be applicable to proceedings under the Rent Control Act. *Palanivel Pillai* v. *Santharam Iyer*[4], states that it is only when it is shown that the prior civil proceedings could not fructify on account of any recognised ground of defect of jurisdiction or other cause of a like nature, section 14 (1) can be invoked. If the earlier proceedings had been dismissed on merits or on the ground that the action was misconceived section 14 (1) will stand excluded. *Sendamarai Ammal* v. *Vijaya Rajagopal Chettiar*[1], expresses the view that section 24 (2) read with section 3 would have the effect of preserving the period of limitation made available earlier under the French Code Civil after merger of the Pondicherry territory with the Indian Union. In respect of a simple mortgage executed in Pondicherry territory on 28th June, 1962, providing for a period of 3 years for repayment of money, a suit instituted by the mortgagee on 28th June, 1982 will be in time as the French Civil Code provides a period of 30 years for the purpose, *Ramalingam* v. *Maheswari*[2], lays down that under the first ground in, O. 9, rule 13, Civil Procedure Code if the summons was held to be not duly served taking note also of the Explanation to Article 123 of the Limitation Act the *ex parte* decree will have to be set aside provided the application to set it aside is made within 30 days from the date of knowledge of the decree. But if there is delay such delay has to be explained by showing cause therefor under section 5 of the Limitation Act. *Sevugam Chettiar* v. *Narayana Raja*[3], points out that under Art. 134 a period of one year is prescribed for an application for delivery of possession by a purchaser of immovable property at a sale in execution of a decree from the time when the sale becomss absolute. According to the provision in Order 21, rule 92 of the Civil Procedure Code, the sale will become absolute only on the Court making an order confirming it. *Ganapathi* v. *Natarajan*[4], holds that the cause of action to seek the remedy under section 47 of the Civil Procedure Code, accrues to the judgment-debtor only on the date of dispossession and the appropriate article of limitation is Art. 137 of the Limitation Act.

1. (1984) 2 M.L.J, 224.
2. (1984) 1 M.L.J. 324.
3. (1984) 1 M.L.J. 85.
4. (1984) 2 M.L.J. 109.

1. (1984) 1 M.L.J. 324.
2. (1984) 1 M.L.J. 285.
3. (1984) 2 M.L.J. 55.
4. (1984) 2 M.L.J. 126.

Law of Evidence.—In *Sara Nssha* v. *Raju*[1], it is held that under S. 68 of the Evidence Act unless the execution by the person by whom a document purports to have been executed is *specifically* denied it shall not be necessary to call an attesting witness in proof of the execution of the said document. The averment that "the plaint allegations are denied" read disjunctively or conjunctively will be a mere denial but not a specific denial. When the legislature used the word 'specific' it intended that the defence about denial of execution should be unambiguous so that the person who relies on the document is put on guard. *Margachari* v. *Krishnaswami Mudaliar*[2], explains *inter alia* that when a person has an apportunity to choose one or other of two inconsistent things, when once he has made an election, it cannot be retracted. It is final and cannot be altered.

Civil Procedure Code.—In *Mahaveerchand* v. *Town Panchayat*[3], it is pointed out that since by astute drafting the real relief may be camouflaged as to make it fall under a different section so that lesser Court-fee may become payable, a Court must be guided by the substance of the relief asked for by taking into account the entirety of the pleas raised and the reliefs prayed for in the plaint. *Rajeswari* v. *Palaniappan*[4], states that the right to relief in action between the parties must be judged in relation to the date of the suit, but the Court may take into account subsequent events for moulding the relief in fairness to both the parties. *Ramamoorthy Sastry* v. *Selvar Paints and Varnish Works*[5], observes that a decree is only a step in the course of realisation of a debt; regarded as a judgment-debt the decree sought to be executed is but a chose in action, *Ramasubba Reddi* v. *Subbayamma*[6], holds that according to the definition in section 2 (11) of the Civil Procedure Code it is not always as legal requisite that inevitably only the heirs all of them or any of them, should figure as legal representative and that any one who intermeddles with the estate of the deceased will be a legal representative but that definition had been narrowed by section 2 (8) of Tamil Nadu Act 18 of 1960 by qualifying as to who had been in continuous possession with the tenant for the purpose of carrying on the business of the tenant up to the death of the tenant and continues to carry on the business thereafter. *Margachari* v. *Krishuaswami Mudaliar*[1], states that where the appellants did not raise any objection but on the coatrary made an endorsement that there was no objection to the execution of the decree, the appellants' conduct before the executing Court went to the root of the matter and would preclude them from raising the plea of jurisdiction on the principle of constructive *res judicata* after the property had been sold in execution of the decree. *Vijaya Bank* v. *Kiran & Co.*[2] decides that where a demand draft purchased at the Madras branch of a Nationalised bank payable at its Bombay branch was intercepted by a third person and the money was deposi, ted in his newly opened account at Madras and that account was later on closed, a suit by the purchaser of the draft against the bank at Madras wherein the draft had been deposited for collection in the City Civil Court, Madras and also against the issuing bank for negligence is competent since obtaining of the draft in Madras would clearly furnish part of the cause of action for the institution of the suit in Madras within section 20 (*c*) of the Civil Procedure Code. *Thiakvsar* v. *Lakshmi Shaumugham Chettiar*[3], holds that where the suit contract was entered into at Karur, and clause 12 of the contract conferred exclusive jurisdiction on Court in Madurai and the plaintiff sued for recovery of a sum of money in respect of the contract at Karur. in view of the finding that the contract had been entered into at Karur, the cause of action for institution of the suit arose at Karur and clause 12 conferring jurisdiction on a Court in Madurai within whose jurisdiction no part of the cause of action arose cannot be invoked challenging the jurisdiction of the Karur court. *Rajeswari* v. *United India Insurance Co*[4]. express-

1. (1984) 2 M.L.J. 152.
2. (1984) 2 M.L.J. 285.
3. (1984) 2 M.L.J. 45.
4. (1984) 2 M.L.J. 62.
5. (1984) 2 M.L.J. 30.
6. (1984) 1 M.L.J. 390. *See also Saroja* v. *Kassi Seetharaman*, (1984) 2 M.L.J. 97

1. (1984) 2 M.L.J. 285.
2. (1984) 1 M.L.J. 32
3. (1984) 1 M.L.J. 428.
4. (1984) 1 M.L.J. 19.

es the view that when the power of transfer of proceeding within its jurisdiction is part of the supervisory jurisdiction, absence of any provision in the matter in the Motor Vehicles Act would not deprive the High Court of the power to transfer pending proceedings from one Tribunal to another, if circumstances warrant. *Ramamoorthy Sastry* v. *Silver Paints and Varnish*[1], makes it clear that sections 40 and 42 of the Code are procedural and do not deal with substantive law. "In such manner as may be prescribed by the rules in force in that State" occurring in section 40 refers to the procedure under which execution should be had and not to the right of execution. Similarly the power that is conferred on the transferee Court under S. 42 is the power for the purpose of execution of the decree. Notwithstanding the transfer of a decree to another Court for execution the transferor Court retains control over the decree. Section 42 does not have the effect of converting the decree into a decree passed by it for all purposes. *Nabisa Beevi* v. *Canara Bank*[2], lays down that on a consideration of the nature of the decree contemplated by section 60 as well as the scope of the exemption enacted under the proviso thereunder the mortgage decree sought to be executed against the petitioner is outside the scope of a decree execution of which by attachment and sale under the section and the proviso thereunder, and the petitioner cannot claim the benefit of exemption under cl. (*c*) to the proviso to section 60 (1). *Rengaraju Chettiar* v. *Meenakshi Ammal*[3], expresses the view that in view of the Supreme Court holding that a contract between the parties gets merged in the order of the Court by passing a compromise decree and thereafter it secures the freedom to act in furtherance of the ends of justice, the executing Court in appropriate cases could extend the time for payment of money and when such powers are invoked it cannot be said that the executing Court is rewriting the contract entered into between the parties or that it is going behind the terms of the decree. *Kuppurajammal* v. *Meenakshi Ammal*[4], holds that on the passing of a final decree for partition by consent of parties the Court ceased to have seisin over the proceedings and therefore it has no jurisdiction to condone the delay or enlarge the time for payment of money under the decree. *Subbiah* v. *Muthuswamy*[1], states that in view of the liberal interpreation of the expression "the Court which passed the decree or made the order" in Order 47, rule 1, the expression "save as otherwise provided" occurring in section 150 opening part cannot be construed so as to take away the jurisdiction of the transferee Court to deal with an application for review in a proceeding received by it by way of transfer. The expression" save as otherwise provided" would mean that in the absence of a contrary provision it cannot be said that it is only the Court which passed the decree or made the order that can review it as even a transferee Court can do so. *Ramalingam* v. *Maheswari*[2] holds that where an application to set aside an *ex parte* decree is made substituted service under Order 5, rule 20 shall not be deemed to be due service. The principles governing applications to set aside an *ex parte* decree under Order 9, rule, 13 are based on two grounds placed alternatively. Under the first ground if the summons was held not to be duly served taking note also of the *Explanation* to Art. 123 of the Limitation Act the *ex parte* decree will have to be set aside provided the application to set aside is filed within 30 days from the date of knowledge of the decree. If there is delay sufficient cause therefor will have to be shown under section 5, Limitation Act. Even if it is to be held that the summons was served taking into account the *Explanation* to Art. 123, Limitation Act the defendant could show sufficient cause within the meaning of Order 9, rule 13 for non-appearance when the suit was called on for hearing. This is the alternative ground. But the application must be made within 30 days from the date of the decree. If filed beyond 30 days the delay beyond 30 days will have to be explained making sufficient cause the refor under section 5 of the Limitation Act. *Mohana* v. *Kannon*[3], states that

1. (1984) 2 M.L.J. 30.
2. (1984) 2 M.L.J. 22.
3. (1984) 1 M.L.J. 125.
4. (1984) 1 M.L.J. 404.

1. (1984) 1 M.L.J. 354.
2. (1984) 1 M.L.J. 285.
3. (1984) 1 M.L.J. 134.

the obligation to produce the documents relied upon by the defendants at the stages contemplated under Order 8, rule 1 (2), Order 8, rule 8-A (1) and both parties under Order 13, rule 1 has been done away with in all those cases with reference to documents produced for cross-examination. This means that the defendant confronting the plaintiff's witnesses need not disclose the document in the list or produce the document at an anterior point of time or even seek and obtain the leave of the Court for tendering such document in the course of cross-examination of a witness of the other side. The expression plaintiff's witnesses in Order 8, rule 1 (6) and rule 8-A (3) would take in not only the witnesses on behalf of the plaintiff but also the plaintiff himself when he is examined as a witness in support of his case. *Brahmaraj* v. *Sivakumar Spinning Mills Ltd.*[1], lays down that a distinct, separate and new case arising out of a subsequent event cannot be brought in by way of amendment. One of the salient considerations which should weigh with the Court in an application for amendment is how far the proposed amendments are necessary to determine the real controversy that is the subject-matter in issue in the pending litigation. Convenience to the party seeking the amendment and lack of prejudice to the other side are not the criteria. *Pugal* v. *Kamala*[2], points out that Order 17 enables a Court to decide a case under Order 17, rule 3 or Order 17, rule 2. What exactly the Court has done will depend on the facts and circumstances of the situation. The fact that the Court has cited Order 17, rule 3 (*a*) for dismissing the suit will not be conclusive on the question whether the decision was on merits or not, In every case the Court will have to lift the veil and find out. If the Court found that the dismissal was really on the ground of non-prosecution on the part of the plaintiff, then notwithstanding the fact that the provision under Order 17, rule 3 (*a*) has been cited by the Court it will be open to consider the order as really one for non-prosecution and not on the merits. If an order in law and substance is an order under Order 9, though purported to be under Order 17, rule 3 it would cause unnecessary expenditure of time and money to an aggrieved party if he is compelled to file an appeal instead of an application for restoration. Notwithstanding the fact that the Court purports to act under Order 17, rule 3 if the circumstances set out by the Court are such that an order under Order. 9 read with Order 17, rule 2 could be legally justified and the actual order passed is one under Order 9 read with Order 17, rule 2 it is permissible for the Court to entertain an application for restoration under Order 9. *Ganapathi* v. *Natarajan*[1], makes it clear that any Court sale held without service of notice on the judgment-debtor as prescribed under Order 21, rule 61 is void. It is because the power to sell the property in execution comes to vest with the Court only after service of the notice on the judgment-debtor under Order 21, rule 66. Where there are irregularities in the conduct or proclamation of sale such sale can be set aside only on an application under Order 21, rule 90. *Neelambal* v. *Mohanram Chettiar*[2], lays down that when in law under special enactments, applications could be filed for setting aside a Court auction sale which is awaiting confirmation, a civil Court would not be right in confirming the sale by confining its attention to Order 21, rule 92, Civil Procedure Code. An order of confirmation cannot be passed because a civil Court is confined not only to the Civil Procedure Code, but has to enforce the provisions of special enactments which embrace

1. (1984) 1 M.L.J. 376,
2. (1984) 1 M.L.J. 414.

1. (1984) 2 M.L.J. 126.
2. (1984) 2 M.L.J. 264.

the property involved in the Court auction sale held in a civil suit. *Rahmania Trading Co.* v. *Pandarinathan*[1] expresses the view that under Order 21, rule 98 (1) all questions relating to right, title and interest in the property arising between the parties to a proceeding on an application under rule 97 shall be determined by the Court dealing with the application and not by a separate suit. Upon the determination of the question under rule 101 an order shall be made allowing the application and directing the applicant to be put in possession of the property or dismiss the application or pass such order as it may under the circumstances of the case. Order 21, rule 98 (1) is, applicable to a case where the obstruction was by a person other than the judgment-debtor or by some other persons at his instigation or on his behalf. The words "subject to the provisions of sub-rule (2)" in rule 98 (1) only mean in the case of obstruction by the judgment-debtor or any of those mentioned in clause (2), not only can the Court direct the applicant to be put in possession of the property but also to detain the judgment-debtor or the person acting at his instigation or on his behalf in civil prison for a term which may extend to 30 days. In case of obstruction by others there is no power in the Court to detain them in civil prison. *Chockalingam* v. *Veerabhadra Chettiar*[2], points out that from the provisions of Order 21, rule 101 it is apparent that the question to be determined in a proceeding under rule 97 or rule 99 has to be decided by the executing Court and not by a separate suit, that is to say a separate suit in such a matter is barred. *Lala Chatram* v. *Krishnammal*[3], makes it clear that where the plaintiff's case is not that there is some further evidence to be let in to establish her case but to wipe the slate clean of her own pleadings and to start a fresh litigation on fresh pleadings the grant of permission to withdraw the suit would not be warranted. Such grant is a non-exercise or irregular exercise of judicial discretion under Order 23, rule 1 of the Civil Procedure Code, *Sevugan Chettiar* v. *Narayana Raja*[1], points out that deposit has to be made at any point of time before or after confirmation of the sale. Where confirmation has not reached finality because the appeal is pending in that sense, there is no confirmation of the sale in the eye of law; the provision in Order 21, rule 92, will be satisfied if the deposit is made before confirmation. It is not a watering down of the imperative implications of the said provision by countenancing any such proposition that there could be a payment or adjustment out of Court other than the deposit contemplated under the provision. *Pappammal* v. *Chidambaram*[2]; states that Order 38, rule 5 (4) is a protective measure conceived in the interest of the defendant and intended to invalidate orders of attachment before judgment of his or her properties indiscriminately without notice giving an opportunity to stave off the attachment by offer of security and without rigidly conforming to the requirements of Order 38, rule 5 (1). It is imperative in view of Order 38, rule 5 (4) that a notice on the lines of Form No. 5 to Appendix H adapted to meet the requirements of Order 38, rule 5 (1) should be prescribed for use.

Sakuntala v. *Sarangapani Naidu*[3], holds that the general rule is that an appellate Court while adjudicating the rights of parties will confine its consideration to facts and law as they stood when the lis terminated in the

1. (1984) 2 M.L.J. 251.
2. (1984) 1 M.L.J. 17.
3. (1984) 1 M.L.J. 28.

1. (1984) 2 M.L.J. 55.
2. (1984) 1 M.L.J. 148.
3. (1994) 1 M.L.J. 336.

first Court and normally will not take cognizance of fact and change in law which came in subsequently. But the Court can in exceptional cases venture out of this rule and mould the reliefs suitably. *Dosky Machado* v. *Francis Gomez* [1], points out that a power of review is not an inherent power; it must be conferred by law either specially or by necessary implication. The Tamil Nadu Buildings (Lease and Rent Control) Act, 1960 does not confer a power of review on the Rent Controller. *Subbiah* v. *Muthuswamy*[1], makes it clear that after the repeal of Order 47, rule 2 by Act 66 of 1956 an application for review would be governed by Order 47, rule 1 and it would appear that even in a particular Court, a successor can review the order passed by his predecessor-in-office. A transferee Court also will have jurisdiction to deal with an application when made before it.

1. (1984) 2 M.L.J. 42.

1. (1984) 1 M.L.J. 354.